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International Covenant on Civil and Political Rights

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Human Rights Committee
Eighty-third session

Summary record of the 2255th meeting
Held at Headquarters, New York, on Monday, 14 March 2005, at 3 p.m.

Chairperson: Ms. Chanet

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Consideration of reports submitted by States parties under article 40 of the Covenant and of country situations (*continued*)

Second periodic report of Kenya

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05-27065 (E)

The meeting was called to order at 3.10 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant and of country situations (*continued*)

Second periodic report of Kenya
(CCPR/C/82/L/KEN and CCPR/C/KEN/2004/2)

1. *At the invitation of the Chairperson, the delegation of Kenya took places at the Committee table.*

2. **Mr. Wako** (Kenya), introducing his country's second periodic report (CCPR/C/KEN/2004/2), said that its late submission, which he regretted, was not due to a lack of commitment to human rights, but rather to insufficient financial, technical and human resources and his Government's focus on urgent and all-consuming political, constitutional, legal and economic reforms. A professional staff had since been trained to assist an Interministerial Committee in ensuring compliance with Kenya's periodic reporting obligations under international treaties. The Committee was composed of representatives of key ministries, civil society organizations and the Kenya National Commission on Human Rights. Members of the National Commission were present at the meeting.

3. Since the submission of its initial report, Kenya had held its first multiparty general elections, in December 1992. In 1997, the Government had launched a constitutional review process aimed at achieving eight objects, including good governance, constitutionalism, the rule of law, respect for human rights and gender equality. The draft Constitution, elaborated by the National Constitutional Conference and still being debated by Parliament, would be submitted for a referendum. The draft bill addressed a number of human rights issues, including the denial of women's right to confer nationality and citizenship on their spouses and children and the inadequate protection of social, economic and cultural rights. Some 15 task forces and committees, including the Inter-Party Parliamentary Group, had been set up to carry out an ambitious legislative reform programme with the active participation of civil society organizations.

4. In 2003, the Kenya National Commission on Human Rights had been established as an independent entity empowered to investigate complaints, visit prisons and related facilities, raise public awareness and recommend measures for the promotion of human rights and the formulation and implementation of human rights programmes. Under the proposed constitutional revisions, the Commission would enjoy the status of a constitutional commission and would consist of a Chairperson, the Human Rights Commissioner, the People's Protector, a Minority Rights Commissioner and six other members with expertise in matters relating to children, persons with disabilities, basic needs and the elderly.

5. With a view to eliminating the extraction of confessions by torture, the Criminal Law (Amendment) Act 2003 recognized only confessions made in court and prohibited corporal punishment. The Children's Act incorporated the provisions of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child into domestic law. The Persons with Disabilities Act of 2003 provided for affirmative action in favour of persons with disabilities and established the National Development Fund for Persons with Disabilities. The National Commission on Gender and Development Act of 2004 established a commission to coordinate, implement and facilitate gender mainstreaming and national development. The National Commission was also responsible for advocating reforms to eliminate customs and practices that violated women's rights. Under the Community Service Orders Act, the courts were authorized to order community service in lieu of custodial sentences for petty offences, as a means of rehabilitating convicted persons and reducing congestion in prisons. The government had also launched a scheme for the release of 20,000 prisoners within the following months.

6. The Statute Law (Repeals and Miscellaneous Amendments) Act 1997 provided amendments to various pieces of legislation. An amendment to the Public Order Act, for example, eliminated the requirement of licence to hold a public meeting. Detention without trial provisions had been repealed under the Preservation of Public Security Act, which now specified that individuals could not be subjected to restrictions on account of their political beliefs or activities. The Sedition Laws had been removed from the Penal Code and the Government's power to ban publications had been severely curtailed. The Police Act, as amended, now required impartial and objective treatment of all persons arrested on political grounds, and prohibited torture or any other cruel, inhuman or

degrading punishment. Additionally, the draconian powers of police chiefs, a throwback to colonial times, had been withdrawn. A new section of the Chief's Authority Act prohibited police chiefs from engaging in the activities of political parties, and from applying torture or cruel, inhuman or degrading treatment or imposing solitary confinement. Under the amended Films and Stage Plays Act, the requirement to obtain a licence for theatre performances was lifted, and the Kenya Broadcasting Act had been amended to ensure balanced broadcasts across the political spectrum.

7. Lastly, a bill on family protection (domestic violence) and another on HIV/AIDS control and prevention had been submitted to Parliament for its consideration.

8. As part of the Government's policy to sign and ratify all relevant international and regional human rights instruments, Kenya had become one of the first four countries to participate in the peer review mechanism of the New Partnership for Africa's Development (NEPAD), which evaluated governance, the rule of law, justice and human rights issues and recommended remedial measures. In 1999, Kenya had invited the Special Rapporteur on Torture of the Commission on Human Rights to visit the country in order to assess the situation of torture. Most of the Special Rapporteur's recommendations had been implemented. The Special Rapporteur of the Subcommission on Promotion and Protection of Human Rights on adequate housing and its Special Rapporteur on corruption had also visited at the Government's invitation.

9. Kenya was considering making a declaration under article 22 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in order to permit individuals to file complaints with the Committee. It was also contemplating ratification of the Optional Protocol to the International Covenant on Civil and Political Rights. The former Nyayo House torture chambers of the 1980s were being converted into an object of shame and an example of acts that must never be repeated.

10. Kenya's National Development Strategy for Wealth and Employment Creation (2003-2007), Poverty Reduction Strategy Paper and National Development Plan accorded priority to promoting good governance, the rule of law and respect for human rights as the foundation for economic growth. In that context, representatives of the key ministries, civil society organizations and the Kenyan National Commission on Human Rights had been appointed to a multisectoral steering committee to coordinate a national action plan for the promotion and protection of human rights. The plan would provide for a legal and policy framework to that end.

11. The Government was currently analysing weaknesses in the national institutions for the administration of justice, which lacked financial, technical and human resources and were plagued by corruption. With a view to restoring the integrity of the judiciary, tribunals of inquiry had been appointed to investigate the conduct of nearly half the judges of the High Court and about 65 per cent of the judges of the Court of Appeal; over eight magistrates had already been dismissed. Kenya had also been the first country to sign and ratify the United Nations Convention against Corruption. Other large-scale reforms in the judiciary and legal sectors included major restructuring to breed a culture of sensitivity to human rights issues, training programmes and the introduction of more effective methodologies.

12. Keenly aware that an environment of peace, law and order was a prerequisite to the enjoyment of human rights, Kenya had successfully hosted conflict resolution initiatives in both the Sudan and Somalia. Its Police Reform Task Force was also retraining police officers with a view to enhancing their sensitivity to human rights concerns in the execution of their duties. The establishment of an independent civilian oversight body to investigate complaints against police officers was also being contemplated.

13. **The Chairperson** invited the delegation to address the list of issues (CCPR/82/L/KEN).

Constitutional and domestic legal framework within which the Covenant is implemented (article 2 of the Covenant)

14. **Mr. Wako** (Kenya), referring to questions 1 to 3 on the list of issues, said that while the provisions of the Covenant had not yet been incorporated into domestic law, a number of its principles were embodied in the Constitution (for example, the Children's Act and the Persons with Disabilities Act). While the Covenant had not been invoked in court cases, court jurisprudence had become markedly more

progressive since the new National Rainbow Coalition Government had come into power in December 2002. There was every indication that the Covenant had been consulted in writing case law, particularly in the High Court.

15. The fundamental rights and freedoms guaranteed by the Covenant were protected by the Kenyan Bill of Rights. Thus, persons whose rights had been violated were entitled to seek legal redress in the High Court of Kenya and those who could not afford to do so were given financial assistance. In 2001, the Chief Justice of Kenya had issued the Protection of Fundamental Rights and Freedoms of the Individual (Practice) Rules, which facilitated complainants' access to the High Court. The large number of complaints pouring in had prompted the establishment of a permanent constitutional court within the High Court to deal exclusively with constitutional matters and judicial review. The Bill of Rights contained in the draft Constitution adopted in March 2004 focused intensively on the enforcement of fundamental rights and freedoms.

16. Kenya had adopted a number of statutes that to some extent implemented the obligations and principles contained in the Covenant, including the Children's Act, which prohibited discrimination against children on grounds of origin, sex, religion, colour, political, sexual and other criteria, the Criminal Law (Amendment) Act and the Community Service Orders Act referred to earlier. The draft Constitution also required the Government to fulfil its human rights treaty obligations, submit timely reports to international human rights treaty bodies and facilitate submissions by civil society organizations to international human rights bodies.

17. Kenya was actively considering acceding to the Optional Protocol.

Provision of effective remedies; impunity (article 2 of the Covenant)

18. Referring to question 4, he said that under the Constitution, any person whose fundamental rights and freedoms had been violated could seek compensation. The Kenya National Commission on Human Rights had a mandate to investigate alleged human rights violations and, where appropriate, recommend compensation for victims and their families. Only a week earlier, the courts had awarded substantial compensation to a person who had been wrongfully detained. Remedies were therefore in place and being applied.

Gender equality, discrimination (articles 3 and 26 of the Covenant)

19. Referring to question 5, he said that there were no legal restrictions on the right of women to equality in marriage, authority within the family, divorce and inheritance. However, there were cultural and social restrictions, which were being addressed in the new draft Constitution and by the National Commission on Gender and Development, which was responsible for advocating for legal reform on women's issues.

20. Referring to question 6, he said that rules on citizenship in the cases mentioned were indeed incompatible with articles 3 and 26 of the Covenant. The new draft Constitution, however, provided that any person married to a Kenyan citizen for at least seven years was entitled to citizenship and that citizenship was no longer lost through marriage or the dissolution thereof.

21. Referring to question 7, he said it could not be denied that gender disparities existed, for historical reasons. The Government was taking steps to address the under-representation of women in decision-making bodies and, in 2003, women had accounted for around one fifth of deputy permanent secretaries, ambassadors and high commissioners. For the first time, under the National Rainbow Coalition (NARC) Government, Kenya now had three female Cabinet members, a huge step forward that demonstrated how seriously the Government took women's issues. Indeed, the NARC party had nominated only women to Parliament. Moreover, almost half the members of the Kenya Human Rights Commission and the Law Reform Commission, and three quarters of the staff of the Office of the Attorney-General were women. The new draft Constitution included a proposal that 50 per cent of the members of Parliament should be women. The Commission on Human Rights and Administrative Justice would also include an expert on women's affairs.

Derogation from rights (articles 4 and 5 of the Covenant)

22. Referring to question 8, he said that the Constitution spelled out a number of special circumstances under which fundamental rights and

freedoms might be derogated from, namely, when the country was at war or when emergency powers were being exercised under the Preservation of Public Security Act. In the latter case, such derogation was subject to parliamentary approval. A state of emergency had existed in North Eastern Province until 1997 in response to security concerns relating to banditry. It had, however, now been lifted and the two related Acts repealed.

Right to life (article 6 of the Covenant); prohibition of torture (article 7 of the Covenant)

23. Referring to question 9, he said that under the Penal Code the death penalty was mandatory for anyone found guilty of murder, treason, robbery with violence or attempted robbery with violence. Parliament had twice debated whether Kenya should abolish the death penalty. On the first occasion, an overwhelming majority had voted against the proposal. By the second debate, support for abolition had increased but had still been insufficient. There had also been an intense discussion of the issue during the National Constitutional Conference, which had been attended by members of Parliament and representatives of a broad spectrum of society. The Constitutional Review Commission had included the abolition of the death penalty in its initial draft, but the proposal had been rejected by the Conference. Kenya was moving closer to abolishing the death penalty, but was not there yet.

24. Referring to question 10, he said that police shootings did occur and had recently increased owing to an upsurge in crime and to the proliferation of small arms, many of which entered Kenya from neighbouring countries. The Government's policy, however, was clear and fully in line with United Nations guidelines concerning reasonable force. When police shootings were fatal, he always ordered a public inquest.

25. Referring to questions 11 and 13, he said that the Penal Code was already very clear on the question of torture. Under new legislation, any police officer who subjected a person to torture or other cruel, inhuman or degrading treatment was guilty of a felony. Moreover, confessions must now be made before the court.

26. Referring to question 12, he said that the number of deaths in custody, excluding executions, had fluctuated between 529 and 769 per year for the period 2000-2003. The statistics did not, however, specify the causes of those deaths. In his view, many if not most of the detainees concerned had died as a result of the poor conditions in Kenyan prisons, particularly extreme overcrowding. In any case, under the Prisons Act, deaths in custody were subject to an inquest. Where detainees had died as a result of torture, or had been killed deliberately by prison wardens, action had been taken.

27. Referring to question 14, he said that the Penal Code permitted abortion only when it was necessary for the protection of the pregnant woman. Abortion was a very emotional issue in Kenya and a number of prominent members of Kenyan society were very vocal in expressing their views.

28. Referring to questions 15 and 16, he said that gender abuse and sexual violence against women and girls continued to be widespread. The Government and non-governmental organizations (NGOs) had intensified their efforts to address the issue, with the result that reported cases of rape and attempted rape had more than doubled between 1997 and 2003, while reported cases of assault and battery had risen by around one third. Various organizations provided legal advice and support for victims of abuse and injustices such as battery, rape, forced early marriage and female genital mutilation. The organization FIDA was particularly active and in 2003 had taken over 200 cases to court. A number of NGOs had also set up shelters for victims of sexual violence.

29. A major education campaign was needed concerning the health hazards of female genital mutilation, which was practised by a number of tribes in Kenya. Surveys had shown that mothers were often the ones advocating or even carrying out the procedure. The issue had been debated in Parliament in 1997 but several members had strongly objected to his claim that the practice was primitive and must be punished. The Ministry of Gender, Sports, Culture and Social Services, along with a number of female members of Parliament, was in the process of visiting rural communities in order to raise awareness and female circumcision was gradually being replaced by other, more peaceful rites and ceremonies. Under the Children's Act, it was unlawful for girls under the age of 16 to undergo the rite.

30. A government task force had reviewed all Kenyan laws and traditional practices to identify those that kept women from enjoying equality with men, and it had

addressed the specific issue of domestic violence, which, as suggested in question 16, was indeed on the rise. At the current session, Parliament had reintroduced the Family Protection (Domestic Violence) Bill, defeated in 1992 by the male-dominated body because of contentious provisions, such as the issuance of a restraining injunction against a violent spouse that would bar him from entering his own house, which was regarded as an unacceptable breach of rural customs. Currently, the Ministry responsible for gender together with civil and non-governmental organizations, was addressing such concerns in advance and trying to get the bill through Parliament. If enacted, that legislation would suffice to deal with domestic violence in Kenya, and would be a model for such legislation in other African countries.

31. Prisons, as suggested in question 17, were indeed overcrowded to the point of being uninhabitable. The new scheme allowing courts to replace prison sentences by community service sentences, involving supervised work on public construction projects, should alleviate some of the overcrowding. The main factor, however, was that 65 per cent of the prison population consisted of persons remanded in custody while awaiting trial, some of whom, because of court delays, were held in prison for longer periods than the sentences they would have received if they had been convicted. In a series of prison reforms that had attracted international recognition, courtrooms had been set up in some of the prisons so that magistrates could close long-standing pretrial detention cases, and thus release many thousands of prisoners. Furthermore, under the Ministry of Justice's Law and Justice Training Programme, new magistrates were being instructed not to automatically incarcerate prisoners awaiting trial, and the budget for prison construction was being expanded.

Security of the person, freedom from arbitrary arrest (article 9 of the Covenant)

32. Referring to question 18, he said that in addition to the laws and regulations governing arrest and pre-trial detention, the Constitution stipulated that detainees must be informed as soon as practicable, in a language they understood, of the reasons for their arrest or detention. Persons arrested were held in police cells pending their court appearance. In practice, however, the length of pretrial detention sometimes exceeded the legal limits, in part because of resource constraints, both human and material.

33. **The Chairperson** invited the Committee to pose additional questions to the delegation concerning questions 1 to 18 on the list of issues.

34. **Mr. Shearer** said he hoped that the report — produced under some compulsion, since the Committee had been ready to consider the situation in Kenya in the absence of a report — would inaugurate a new chapter in the relations between the Committee and the State party.

35. The general issue of corruption, which was acknowledged in both the oral introduction and the written responses to the list of issues, and which, if anything, was reportedly worse under the current administration, was a matter of deep concern to the Committee and the international community. Corruption affected the whole fabric of a country, with profound implications for Covenant rights. Beyond the Government's policy of zero tolerance towards corruption as referred to by the delegation, what had the Government done to address it, and was there any institution in place — a watchdog committee or an official appointed to report to Parliament — to take action against corruption?

36. The status of the Covenant within Kenya's legal system — a totally separate issue from accession to the Optional Protocol — and the possibility of invoking it in the courts should be clarified. The delegation had implied that appeals could be made on the basis of the Covenant, and should give information about any such instances.

37. He would like to hear more about the Law and Justice Training Programme to educate magistrates concerning arrest and detention procedures and would appreciate an explanation of why 14 days of pretrial detention were allowed in suspected capital cases as against the usual 24-hour rule.

38. Furthermore, it was not clear whether and when the National Commission on Human Rights had been established by statute, whether it was fully operative, and whether the Commission on Human Rights and Administrative Justice contemplated in the proposed new Constitution was the same body.

39. **Mr. Glele Ahanhanzo**, observing that the delegation's oral introduction and replies to the list of issues showed Kenya's clear intention to comply with

the Covenant, said that, as always in an African country, the solutions and approaches to upholding any legal system had to be distinctively African ones.

40. On the question of gender equality, he would like to know what practical steps were being taken to safeguard the property and inheritance rights of women, especially in the rural areas. It would be interesting to know how many women were members of the National Commission on Gender and Development. The representation of women in decision-making government bodies was encouraging, but information should also be provided about their representation in positions of power in the private sector. Data would also be useful on the education of women at all levels, as would more information about measures to remedy gender inequality, other than the affirmative action envisaged under the draft Constitution.

41. He wondered what specifically was being done to change public attitudes concerning the practice of female genital mutilation, particularly among adults who were beyond the reach of the schools, and to what extent civil society organizations were participating in the Government's consciousness-raising campaign.

42. **Mr. Rivas Posada** observed that a delay of 25 years in reporting made it hard for the Committee to study the human rights situation in the State party.

43. Although apparently no state of emergency had been declared since 1976, it would be interesting to know what the constitutional provisions in the matter were: for instance, whether the constitutionality and legitimacy of declarations of a state of emergency or of Presidential derogations from certain rights could be challenged in the courts. It was not clear if a presidential order of a state of emergency had to be regularly extended every 28 days or if approval by the National Assembly made the order permanent until it was revoked; the question of whether the Assembly had the power, before the initial 28 days were up, to revoke a presidential order or modify the provisions of a presidential declaration extinguishing certain rights should also be clarified. Lastly, did the Constitution or the Preservation of Public Security Act actually specify which articles of the Covenant were not subject to derogation?

44. **Mr. Castillero Hoyos** requested an explanation for any differences that might exist between the procedural guarantees for persons accused of "armed robbery with violence" and those accused of murder or treason. The question also arose whether holding prisoners on death row for some 15 years might not be considered inhuman and degrading treatment. He wondered whether consideration had been given to establishing an independent mechanism, separate from the police force, to investigate police policies and actions, and why police statistics on the excessive use of force were different from those of independent sources. How was the human rights manual applied by the police, and what measures were planned to bring police action into line with United Nations standards?

45. It would be useful to know how many complaints of torture had been submitted in the previous five years and how the Kenyan Commission on Human Rights could provide real guarantees against torture without sufficient resources. He requested information on the secret police and whether its agents were those mainly responsible for acts of torture. Was torture also committed by the armed forces and, if so, how did the State party plan to deal with that situation?

46. The Government should indicate how it planned to deal with ethnic and tribal clashes and why more had not been done in that regard.

47. He wished to know what percentage of detainees had died in prison, whether that figure was acceptable and, if so, according to what criteria. When would additional figures be available on the mistreatment of prisoners?

48. Details should be provided on the results of the prohibition of abortion, in particular, the serious threat to the health and lives of women posed by illegal abortions, and the severe penalties, including the death penalty, for performing an abortion, especially given the limited access to contraception. Was there an awareness that poor women suffered most from that situation? He wondered whether cases of rape would be included in the draft Constitution as exceptions to the prohibition of abortion?

49. **Mr. Lallah** said that the State party must take the initiative in dealing with the customs and traditions which impeded the implementation of the Covenant. He noted that judges in Kenya did not refer to the Covenant when taking decisions and that the report had been drafted without taking into account the general comments or jurisprudence of the Committee.

50. He asked whether any anti-terrorism law had been adopted. Noting that the general application of the rights contained in articles 9, 18, 19 and 22 of the Covenant was an obligation of the State party, he asked whether any judicial powers had been transferred to the executive branch. When a state of emergency had been declared, had the reasons for doing so been explained? What rights had been suspended and what limits had been placed on the derogation from rights?

51. With regard to discrimination against women, the question arose whether the absence of gender equality as one of the fundamental rights guaranteed under article 70 of the Constitution constituted a violation of articles 3, 16 and 26 of the Covenant. Article 82 of the Constitution also contained countless limitations on the general prohibition of discrimination against women.

52. Referring to paragraph 109 of the Kenyan report, he asked how the rights protected under article 11 and article 14, paragraph 3 (g), of the Covenant could be guaranteed for a person imprisoned for indebtedness who refused to testify on his own behalf.

53. **Sir Nigel Rodley** requested information on the measures taken to ensure that the police did not have a monopoly over the issuance of forms for reporting allegations of abuse. In addition, he failed to understand the difficulties encountered by the delegation in obtaining statistics about the number of inmates on death row, as it should be sufficient to visit a Kenyan prison to determine the number of such inmates and the reasons for their confinement.

54. **Mr. Amor** pointed out that all the provisions of the Covenant must be respected under the domestic law of the State party, despite the influence of social and cultural forces and customary and Islamic law. In particular, discrimination against women, family law, corporal punishment, female genital mutilation and the rights of the child were areas of concern.

55. Further clarification should be provided concerning aspects of paragraph 7 of the report which might run counter to the Covenant; paragraph 40, on freedom of movement; paragraph 83, concerning the discretion of the courts; and paragraph 86, which appeared to indicate that a drug addict could, for example, lose all the rights protected by the Covenant.

The meeting rose at 6 p.m.

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Summary record of the 2256th meeting
Held at Headquarters, New York, on Tuesday, 1 March 2005, at 10 a.m.

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05-27055 (E)

The meeting was called to order at 10.15 a.m.

Consideration of reports submitted by States parties under article 40 of the Covenant and of country situations (*continued*)

Second periodic report of Kenya (*continued*) (CCPR/C/KEN/2004/2; CCPR/C/82/L/KEN)

1. *At the invitation of the Chairperson, the delegation of Kenya took places at the Committee table.*

2. **The Chairperson** invited Committee members to ask any additional questions they might have concerning questions 1 to 18 on the list of issues.

3. **Mr. Bhagwati** said that he was concerned that Covenant rights were spread throughout various constitutional and domestic legal provisions. They were not, as such, enforceable in the domestic courts. Currently, their status was no higher than that of domestic law, which was subject to the vagaries of the legislature. They should be embodied in the Constitution, which was more difficult to amend than domestic legislation. He hoped that the new Constitution would contain a chapter devoted exclusively to Covenant rights.

4. He wanted to know whether there was a training programme for judges and, if so, whether any part of it was dedicated to the Covenant. Even if the Covenant was not part of domestic jurisprudence, the rights that it conferred could be relied on for the interpretation of domestic law and that law could be construed as giving effect to Covenant rights, in accordance with the Bangalore Principles of Judicial Conduct. Accordingly judges needed training in the art and skill of incorporating human rights through judicial interpretation.

5. He wanted to know whether the Kenya National Human Rights Commission was a statutory body, what its functions were, how its officials were appointed and whether they had security of tenure. He wondered whether its recommendations were binding. He asked whether the Commission had made efforts to change cultural attitudes and build a democratic structure of human rights. He sought information on measures to improve women's representation in Parliament, including reverse discrimination.

6. Certain paragraphs of the report required clarification. Paragraph 33 appeared to imply that the parents of an intestate person were given priority over the spouse and children in matters of inheritance. If so, the spouse and children would get nothing and have to rely on in-laws. He wanted to know whether the property rights of women described in paragraph 37 applied unconditionally.

7. Limited access to contraception led to unwanted pregnancies, which often resulted in illegal abortions that endangered the mother's life. He wanted to know whether the Government contemplated legalizing abortion in certain circumstances, or taking any other steps to prevent such situations. Female genital mutilation was widely practised in rural areas, and he wanted to know whether any law prohibited it. Furthermore, men and women needed education to encourage them to abandon the practice.

8. **Mr. Johnson López** said that he would appreciate additional information regarding the constitutional or legal provisions underpinning the decision to remove more than 60 judges from office and the legal formalities for replacing members of the bench. He endorsed Mr. Bhagwati's questions with regard to the Kenya Human Rights Commission.

9. **Mr. O'Flaherty** asked how active the Government of Kenya was in protecting refugees under article 2 of the Covenant, including by assisting those who wanted to return to southern Sudan and other locations. He sought more information egarding the status of a refugee bill currently before Parliament and the degree to which it focused on Covenant rights. He enquired about the status of the proposal to establish a Truth and Reconciliation Commission, referred to in paragraph 44, and how many of the Covenant's principles, such as reparations for human rights abuses, had been incorporated in the proposal.

10. **Ms. Wedgwood** asked how many of the nine prosecutions for the shooting of police officers had resulted in conviction and how many of those responsible for deaths in custody had been prosecuted and/or convicted. While she held the Truth and Reconciliation Commission to be a possibility, it was perhaps premature: there could be no reconciliation without prosecution. She wanted to know whether the Commission would have the power to order removal of police officials for deadly use of force. She understood that insufficient food was a problem in prisons,

particularly in cases of pre-trial detention, and requested more information on prisoners' caloric intake. More information would be appreciated about measures to protect victims of domestic violence, and the HIV/AIDS statistics contained in paragraph 63 of the report should be clarified. She asked for a comparison of Kenya's and Uganda's methods of dealing with the epidemic.

11. **The Chairperson** invited the delegation to reply to the additional questions.

12. **Mr. Wako** (Kenya) said that the Anti-Corruption Commission was a totally independent body constituted to receive complaints from the public, the National Assembly and the Attorney General, to investigate corruption and to conduct promotional activities to counter corruption. Its appointment procedures were completely transparent: posts must be advertised and candidates were selected by an advisory board that had no Government participation. The director and his deputy had security of tenure. Following investigations that provided sufficient evidence, cases were submitted to the Attorney General for prosecution. Proceedings were transparent. His office was committed to eradicating corruption, and the system in place had shown significant results.

13. The conflicting dates surrounding the establishment of the Kenya National Human Rights Commission were both correct. The confusion arose from the enactment in 2002, shortly before a general election, of the bill establishing the Commission. The delay caused by the electoral process had prevented the law from becoming operational until 2003. The appointment procedures for the Human Rights and Anti-Corruption Commissions were similar.

14. He accepted Mr. Bhagwati's position on the status of the Covenant within law: his Government fully subscribed to the Bangalore Principles. While national jurisprudence had hitherto scarcely referred to the Covenant, the situation was set to change in the future. Once Kenya had ratified the Optional Protocol, people would become more aware of the Covenant. At that point the judicial interpretation of the laws already existing within the Constitution and domestic legislation would place the Covenant within the national jurisprudence.

15. Kenya was correct in not enacting domestic legislation to provide for Covenant rights. Kenya had a written Constitution. Accordingly, if it passed such legislation, the rights would be second class, subject to interpretation under the Constitution. Human rights were not a controversial issue under the proposed Constitution. One had only to look at the Bill of Rights to see that the scope of rights thereunder was even greater than under the Covenant. Should the constitutional process come to nought, the Government would then be forced to amend its current Constitution to conform to the provisions of the Covenant.

16. The Government of Kenya did not discriminate against women. It was moving ahead, including through affirmative action, to guarantee equality in political, economic and social rights for women. That was the purpose of the Commission on Gender Development.

17. **Ms. Wambua** (Kenya) said that the Government had always acknowledged the vital role of women in national development. Indeed, the Women's Bureau established in 1976 within the Department of Social Services to ensure the integration of women in the development process had been upgraded since December 2004 into the Department of Gender. Providing some 2003 figures on the presence of women in various aspects of Kenyan life, she noted that in the agricultural sector, out of a total workforce of 316,000, women accounted for 78,500. In the manufacturing sector, women made up 141,100 of the total of 241,000 workers, with men accounting for 199, 600. In public administration, there were 55,600 women as compared to 94,200 men. Kenya now had the largest number of women members of Parliament ever, 18 out of a total of 220. In primary education, girls accounted for 49.9 per cent of total enrolment, with boys making up 50.1 per cent. In secondary education, the figures for female and male students were 48.2 and 51.8 per cent, respectively. Women accounted for 45.5 per cent of the 8,021 students in private universities; the corresponding figure for public universities, out of a total of 52,408, was 30.8 per cent.

18. **Mr. Kiai** (Kenya) said that the Kenya Human Rights Commission had a broad mandate which incorporated political, civil, economic, cultural and social rights. The Commission set its own agenda; its strategic plan had been published in 2003. There were basically three major impediments in the area of culture — traditional culture, societal culture and governmental culture. In the area of traditional culture, the Commission was working with traditional institutions to push for changes with regard to women's

property and inheritance rights. Indeed, despite the existing law, Kenyan women, particularly rural women, could not inherit from their parents and husbands. The HIV/AIDS pandemic had compounded the situation, increasing poverty among women. Societal culture, which had accepted over 40 years of autocracy and oppression, was beginning to change. The Commission was also trying to empower people to challenge their leadership and push for accountability at all levels of Government. It was also actively working on changing governmental culture from one that stripped people of their rights and property and harassed them, to one of service to the people.

19. Unfortunately, the Commission lacked adequate capacity and funding. Furthermore, because the Commission was a new institution that was supposed to serve as a Government watchdog, it often suffered from a lack of cooperation from State entities, particularly the police. It did, however, enjoy full cooperation from the Attorney-General's office. Financial independence was crucial. Currently, the Commission was valiantly resisting efforts to make it a Government department.

20. **Ms. Angote** (Kenya) said that the aim of the governance, justice, law and order sector reform programme was to reform and strengthen sector institutions for efficient, accountable and transparent administration of justice. It involved four Government ministries and over 32 departments. The aim was to move from narrow institutional thinking towards a broader, implementation-oriented approach. Under the programme, entry-level magistrates were trained in sentencing procedures prior to being sent to various courts throughout the country so as to make them aware of the consequences of their rulings on the increase in prison congestion. Police officers and prison wardens were trained in the promotion and protection of human rights as they carried out their duties, including the potential impact of arrests, such as the overcrowding of prisons.

21. **Mr. Wako** (Kenya), referring to the declaration of a state of emergency, said that the Committee should consider Kenya's Constitution as a whole. Article 83 of the Constitution, entitled "Derogation from fundamental rights and freedoms", listed the rights that could be derogated from in a state of emergency. All the other rights could not be derogated from, consistent with the provisions of the Covenant. The special sections of the Constitution which had been enacted to deal with a war of secession in Kenya's north-eastern province at independence together with the acts of Parliament enacted pursuant to those sections had been repealed. Any declaration of a state of emergency must be subject to the approval of Parliament.

22. On the distinction between cases of robbery with violence and ordinary murder cases, both of which could result in capital punishment, he noted that ordinary murder cases were heard by the High Court of Kenya. Under the current system, any accused who could not afford a lawyer were provided with an advocate to represent them, whereas in cases of robbery with violence, which were heard in magistrate's courts, the accused did not enjoy such a procedural safeguard. Reforms were under way to provide procedural safeguards in all murder and capital punishment cases.

23. The Government had never given the police "shoot-to-kill" orders. Any use of firearms by the police must be in accordance with the law and with the standards laid down under the United Nations Code of Conduct for Law Enforcement Officials. Human rights training programmes were under way for police officers. The police department had even allowed civil society groups, including women's rights advocates, to go to their training camps to conduct human rights training. Women's desks had been established at some police stations to receive reports and complaints on issues such as domestic violence and rape. The ultimate goal was to have such desks at every police station throughout the country.

24. He could not provide the current figure for the number of prisoners on death row but the Government was very aware that such prolonged confinement could be cruel, degrading and unusual punishment. Many death sentences had been commuted to life imprisonment and some death row inmates who had served more than 20 years had even been released. As of 2002, over 19 police officers had been arraigned in court for human rights violations; a number of those cases had resulted in convictions, while INTERPOL was trying to locate the others at large. There was a very clear chain of command within the police force. All police officers were answerable to and under the direction of the Commissioner of Police. That was why in carrying out law reforms the main focus was on the duties of the Commissioner of Police in matters relating to human rights. He was not aware of any torture in the armed forces.

25. The former Government had established the Akiwumi Commission to look into the land clashes. Apart from a number of recommendations for follow-up action, that Commission's report had concluded, inter alia, that most of the land clashes were due to pressure on land, specifically competing river, water and land resource use. The long-term solution lay in how water resources were allocated to all the communities. A task force on the creation of a truth, justice and reconciliation commission had submitted its report to the Government.

26. Abortion was currently prohibited, except where the mother's life was at stake when so certified by a doctor. Some groups were lobbying to change the law so as to make access to abortion easier, and others, in particular religious groups, wanted the restrictions tightened, seeking essentially to abolish abortion in all circumstances.

27. Kenya had no anti-terrorism law as yet, although a draft bill was being reviewed by international and national non-governmental human rights organizations in order to ensure proper balance between the need to deal with the threat of terrorism and the need to protect human rights. Kenya wished to avoid the danger of giving the executive too much judicial power. He hoped the bill would be adopted by the end of the year.

28. The administrative form in prisoners' dossiers that specified and justified the form and duration of their detention was being revised in order to provide more detail and be more readily available. The law specified the maximum sentences for crimes, and courts had discretion in sentencing depending on the circumstances of the case, although that discretion was itself subject to legal bounds. The security of judges had been well covered in his delegation's written answer to question 18 on the list of issues. As there had been many allegations of corruption in the judiciary, the Chief Justice had appointed a committee to hear complaints, investigate and make recommendations, and a tribunal had been established. Unexpectedly, more than 50 per cent of the judges of the High Court and Court of Appeal had resigned rather than submit to investigation, so there were numerous judicial posts that needed to be filled.

29. The figures in the report regarding HIV/AIDS were, unfortunately, accurate. A national AIDS control committee had been formed to sensitize people to the risks of certain behaviours. The high cost of medication aggravated the problem. Domestic violence was the subject of a bill under review by the Government, along with other legislation regarding harmful traditional practices, such as female genital mutilation, imposed on girls under 18.

30. The Refugees Bill had been prepared in consultation with the Office of the High Commissioner for Refugees in order to ensure that the concerns raised in international humanitarian law were met.

31. **Sir Nigel Rodley** asked how Kenya envisaged incorporating the provisions of the Covenant into its Constitution. The existing human rights clauses were not entirely consistent with the Covenant and the draft seen by the Committee did not show improvements in certain key areas, such as the right to counsel in capital cases, without which a person was essentially being held in incommunicado detention. He also sought more information on measures taken by the Government to ensure that national human rights bodies could in fact obtain full cooperation from the police in seeking access to prisons and detainees.

32. **Mr. Lallah** suggested that the Government, in preparing to draft an anti-terrorism law, should take a close look at the materials that could be obtained from the Committee in that connection, including its general comments on articles 2 and 4.

33. **Ms. Wedgwood** asked whether anyone had been convicted of causing the death of a prisoner or if any policemen had been convicted of exercising excessive force, including shooting, leading to death. She also asked about the standard of nutrition provided to detainees.

34. **Mr. Wako** (Kenya) said he welcomed an opportunity to review the general comments of the Committee, in particular as they related to anti-terrorism legislation. He noted that there had been problems in ensuring that human rights bodies had full access to detainees, but they were isolated and not systemic. Ensuring legal assistance to indigent detainees was a goal for which most developing countries lacked adequate resources. He expressed his appreciation of the activities by groups in civil society aimed at filling that gap in government resources. There had been successful prosecutions of prison officers who had murdered prisoners and of police officers who had exercised excessive force leading to death. Some of those accused of such crimes had, however, fled the country and were being sought by

Kenyan authorities through Interpol. A task force on police reform had called for an independent prosecuting body to deal with such crimes.

35. **The Chairperson** invited the delegation of Kenya to address questions 19 to 30 on the list of questions.

36. **Mr. Wako** (Kenya) briefly reviewed the written answer to question 19 on the judiciary provided by his delegation and stressed that the independence of the Judicial Service Commission was guaranteed in the Constitution. Much of question 20 on judicial corruption had been dealt with in earlier oral responses; he noted that the income and assets disclosure requirements imposed by the Public Officer Ethics Act and the activities of the Kenya Anti-Corruption Commission had proved to be effective anti-corruption tools. Earlier oral responses had covered legal aid, raised in question 21, and the written response to question 22 had dealt fully with the relationship between the secular and Muslim courts. He assured members of the Committee, in connection with question 23 on the treatment of residents of informal settlements, particularly around Nairobi, that there had been no evictions and that the relevant government ministries were studying solutions to the problem of such settlements in consultation with Habitat. The issues raised in question 24 regarding alleged manipulation of broadcast permits to the detriment of political opposition had been a problem under the previous Administration but the current Government had adopted a policy of granting such permits without any regard to political tendencies.

37. Concerning the question as on the requirement that publishers should purchase a bond before printing a publication, he pointed out that the cost of such a bond was not high and that the purpose of the measure, which did not apply to existing publications, was to put some order into the publishing industry and not to muzzle the press. Publishers were similarly required to have official business premises in the event of their being sued for libel, for instance. Referring to question 26, he emphasized that many of the restrictions previously in place regarding articles 21 and 22 of the Covenant had been lifted when the law had been amended in December 1992 for example, a licence was no longer required to hold a meeting, in the case of social gatherings. It was necessary, however, for political meetings to be notified in advance to law enforcement officers and entered into an official register, essentially for practical reasons. Such political meetings did not include gatherings taking place through the action of members of parliament.

38. With regard to question 27 on child labour, the Ministry of Labour and trade unions, with the assistance of the International Labour Organization, were currently addressing that issue on which, moreover, the Kenyan Commission on Human Rights was sensitizing the population. What was defined as child labour was not always child labour in the strict sense.

39. Responding to concerns raised about the minimum age of marriage, he specified that it was 18 years but that cases of marriage at the age of 16 did occur because of the influence of religion or customs. When such cases were reported to the Government, it took suitable action, in particular by putting the girls back into school.

40. On the question of awareness-raising regarding the provisions of the Convention, he said that action had been taken, albeit not as much as he would have liked, aimed in particular at judges and law enforcement officers. The Kenya Human Rights Commission was the chief agent responsible for popularizing the Convention and monitoring compliance with the obligations deriving from it.

41. **Mr. Shearer** asked for further information about the structure of the judiciary and the qualifications of judges, particularly in the subordinate courts, which had been invested with wide-ranging jurisdiction in order to lessen the pressure on the higher courts. Were magistrates in such courts legally qualified? Did they receive prior training or had they served as practising lawyers? He would appreciate it if the Government could provide, in due course, full details of any such training programme. He also wondered what happened in the case of appeals.

42. Referring to question 21 on the list of issues (availability of legal aid), he noted that there was a gap between the State's obligations under article 15, paragraph 3 (d), of the Convention and the Government's action in that regard. While understanding the limited possibilities of developing countries, he took the view that more needed to be done. Noting the proposed measures for the extension of the legal aid system, he suggested that assistance should be sought from unofficial bodies and looked forward to a fuller report.

43. **Mr. Glele Ahanhanzo** said he wished to know more about the "Kadhis courts", particularly their number and their links with other courts. He wondered what happened in the case of a conflict between a Muslim and a non-Muslim and how equality before the law was ensured. Had any agency been given responsibility for harmonizing the law in Kenya?

44. On the matter of forcible evictions and the demolition of housing, he wished to be informed in writing of measures taken by the Government to safeguard the right to housing, particularly a training programme aimed at police officers and other officials concerned.

45. **Mr. Castillero Hoyos** asked for details of the work of the interministerial commission set up to address the matter of forced evictions. He enquired whether its findings were to be made public and if the communities affected had been consulted. He also asked what action would be taken on its recommendations, whether they were up to international standards and what would be done to ensure that evacuations took place in accordance with the law. Lastly, would evacuated persons be offered alternative accommodation, benefit from social services and be compensated for their losses?

46. **Mr. Rivas Posada**, while welcoming the measures that had been taken to expand radio and television broadcasting in the country, asked what the actual situation was regarding the granting of licences. He wondered whether the requirement that a bond should be purchased by publishers might not lead to abuses. Did it not mean, in practice, a curtailment of rights? With regard to restrictions on freedom of assembly and association, he wished to know which authorities imposed them and what recourse was available to those on whom they were imposed. On the question of child labour, he expressed great concern, referring to the very high numbers of children said to be working in the Central Province and the very large proportion of children involved in prostitution and drug trafficking. He would appreciate information on the situation country-wide, not only in terms of legislation, but also in actual practice. He was extremely concerned to learn from Kenya's report that the age of criminal responsibility in that country was eight years and wished to know why it was so low. Lastly, on women's rights, he wondered about the different kinds of marriage regime allowed and their compatibility with the Covenant's provisions to protect the dignity of women, in particular whether polygamy was legally recognized.

47. **Mr. Wieruszewski**, invoking article 26 of the Convention, supported by a considerable body of case law, wished to know whether any change in the law was being envisaged in Kenya in order to prevent discrimination on the ground of homosexuality.

48. **Mr. Solari Yrigoyen** asked whether military service was compulsory in Kenya and whether the right of conscientious objection was recognized, in accordance with article 18 of the Convention. He also wished to know whether conscientious objectors were offered the possibility of alternative forms of community service.

49. **Mr. O'Flaherty** said he shared many of the concerns already expressed, particularly with regard to discrimination against homosexuals and the treatment of children. Noting that, although banned in schools, corporal punishment was still prevalent in the country, he expressed the view that the Government should give priority to the matter. On the question of child trafficking, a cross-sectoral and multifaceted response was required, and he wished to know whether the Government had mainstreamed it as a policy concern or set up an institutional mechanism to address the issue.

The meeting rose at 12.55 p.m.